The House of Representatives and the Treaty-Making Power

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THE HOUSE OF REPRESENTATIVES AND THE TREATY-MAKING POWER

CERTAIN GENERAL AND HISTORICAL CONSIDERATIONS

The typical American layman seems content to take the treaty-making power for granted. He knows little of the actual operation of the system—whether of the modes of procedure or of the forces and influences which may be brought to bear upon it by those outside, as well as within, the constitutional departments and agencies vested with the power of negotiating, approving, ratifying, and carrying into effect this nation's international agreements. Nor does the utilitarian layman often express desire to learn more of the system.

As a matter of fact, the treaty-making power constitutes a subject which is quite apart from the things of most immediate concern to him. He evinces much more interest in the results likely to be brought about by the terms of a given treaty—whether it be the acquisition of rights making possible a Panama Canal, or the entrance of this country into the League of Nations—than in the actual modes of procedure and the forces at work which give the treaty to the nation.

Upon no more than a cursory examination of the treaty-making process, however, interesting constitutional questions come to the surface which challenge analysis and research. In a larger sense, the questions suggested should prove of general interest to followers of constitutional law who are interested in raising the lid and looking beneath the obvious presumptions and commonly accepted premises relative to the treaty power.

1 The Constitution of the United States provides that:

"He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. . . ." (Art. II, Sec. 2).

". . . All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. . . ." (Art. VI, Cl. 2).

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills. . . ." (Art. I, Sec. 7).

"No money shall be drawn from the treasury, but in consequence of appropriations made by law. . . ." (Art. I, Sec. 9).
The purpose of the present study is indicated by the title. The writer attempts to determine the extent to which the treaty-making power is influenced by the House of Representatives—an agency which is not included in the constitutional plan provided for the negotiation, approval, and ratification of treaties. But when the subject is surveyed from the angle of the House of Representatives, several questions are likely to arise in the reader's mind. Although the House is excluded from the formal procedure of treaty-making, does that body, under the Constitution, have any powers by which it can influence the making and enforcement of treaties? May the so-called lower house of the national legislature, as a matter of constitutional right, claim a share—be it major or minor—of this pretentious authority? What restraining powers, if any, are at the disposal of this body to be employed against the Executive as he launches upon treaty negotiations, or after the completed agreement is presented to the Senate for its “advice and consent”? Is the House constitutionally or morally bound to vote, and must it waive its own scruples and desires in voting, appropriations provided for in treaties, or may that body be governed by its own discretion as to the necessity of approving such expenditures? These and other inquiries might be made, and, although now the answers to some have become comparatively simple due to some one hundred-thirty years of precedent, evolution, and tradition, yet as regards others, the results are by no means so uniform and well settled.

The power to make treaties under the Articles of Confederation (1781-1789), in the absence of a separate executive, was lodged in the unicameral Congress. Article IX of the Articles

provided, under certain enumerated conditions as to commer-
cial treaties, that:

The United States in Congress assembled, shall have the sole and
exclusive right and power of . . . entering into treaties and
alliances. . . .
The United States in Congress assembled shall never. . . .
enter into any treaties or alliances . . . unless nine States assent
to the same. . . .

The Articles also provided that the states should not, with-
out the consent of Congress, enter into treaties, either among
themselves or with foreign nations. The experience of the Con-
federate Congress indicated only too forcibly that a large legis-
lative assembly, acting alone, leaves much to be desired in the
skillful management of foreign affairs, and, in the light of this
experience, the Constitutional Convention of 1787 resolved that
a radical change must be effected in the manner of direction of
international relations, including, of course, the treaty-making
power.

Although it was quite generally agreed in the Federal Con-
vention that the Executive should assume the lead in the treaty-
making process, a difference of opinion developed as to the kind
and degree of legislative check that should be imposed. The
Randolph Resolutions, embodying the so-called Virginia or
“Large State” plan of government, did not include a clause re-
lating to treaty-making. Likewise, in the Paterson Resolutions
nothing was said as to the manner in which treaties were to be
effected, but inasmuch as the Paterson plan was contingent upon
the retention of the Articles of Confederation, it may be assumed
that the congressional mode of control was to be retained. Pinckney
went farther, however, and in his draft of a constitu-
tion proposed that the Senate should have “the sole and exclu-
sive” power to make treaties.

Alexander Hamilton’s scheme of a constitution for the gov-
ernment of the United States was the only one of the four sub-
mitted plans to include the fundamental proposition of coopera-
tion between the executive and legislative departments in the

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*Article VI.
*Madison’s Papers (Gilpin Edition), II:731-35.
*See the Documentary History of the Constitution of the United
*Madison’s Papers, II:742. Compare, also, Documentary History
of the Constitution, I:317.
treaty-making process—the idea that was eventually agreed to by the Convention. Article 4 of Hamilton's scheme proposed that the "Supreme Executive Authority" be vested in a Governor, who was to have as one of his "authorities and functions" the power of making all treaties "with the advice and approbation of the Senate." Article 6 went on to provide that the Senate was to have "the power of advising and approving all treaties." This, with the exception of the two-thirds vote provision, was substantially the plan which was eventually adopted, although in different language. Whether or not Hamilton is to be credited with the authorship of the idea, the writer has not been able to ascertain.

In the course of the Convention debate on the make-up of the treaty-making power, a small minority group, including, among others, such delegates as Mercer, Dickinson, Gouverneur Morris, and James Wilson, favored a check by the entire legislature rather than by the Senate alone. The principal argument of this small group was that since treaties under the Constitution were to operate as laws, they should also have the sanction of laws, which could be given, not by the Senate acting alone, but by the whole legislative body. Delegate Mercer, for example, suggested that the power to make treaties belonged to the executive department and ought not to be final "so as to alter the laws of the land, till ratified by legislative authority." Procedure in Great Britain was cited as an example in an effort to drive the point home.

Gouverneur Morris wished to impose a strong legislative brake upon the treaty-making power, and proposed an amendment to the effect that "no treaty shall be binding on the United States which is not ratified by law." "The more difficulty in making treaties," suggested Morris, "the more value will be set on them." Madison "suggested the inconvenience of requiring a legal ratification of treaties of alliance, for the purpose of

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1 For a copy of Col. Hamilton's plan see Documentary History of the Constitution, I:327-32; also Madison's Papers, II:891.
2 Documentary History of the Constitution, I:327.
3 Ibid., p. 328.
4 Madison's Papers, III:1331-32.
5 Madison's Papers, III:1412-13; also Documentary History of the Constitution, I:150.
war, etc.," but James Wilson replied that without a check such as that proposed by the Morris amendment, he should fear the power of the Senate. Mr. Dickinson favored ratification by law as "most safe and proper, though he was sensible it was unfavorable to the little states, which would otherwise have an equal share in making treaties."

Mr. Madison next attempted a compromise on the question by asking whether a "distinction might not be made between different sorts of treaties; allowing the President and Senate to make treaties eventual, and of alliance for limited terms, and requiring the concurrence of the whole Legislature in other treaties." Later in the Convention, James Wilson, still giving voice to his preference for participation by the entire legislature in the treaty-making process, moved to amend the treaty article to read, "by and with the advice and consent of the Senate and House of Representatives." Wilson pleaded that since treaties under the Constitution were to operate as laws, they should also have the sanction of laws. He recognized the validity of the objection that the entire Congress might not be a fit repository for diplomatic secrets connected with treaty negotiations, but so far as the two things were mutually contradictory and inconsistent, he thought the necessity for secrecy was outweighed by the urgency of a legislative sanction. Delegate Williamson rose to express his fear of the possibility that, if treaties were made in the Senate alone, they might be made by a majority of the States without a majority of the people. Eight men, he suggested, might be the majority of a quorum Mr. Sherman opposed "leaving the rights established by the treaty of peace, to the Senate; and moved to annex a proviso, that no such rights should be ceded without the sanction of the Legislature."

The debates and votes in the Convention show, however, that the body was overwhelmingly opposed to the proposal for admitting the House of Representatives to a direct place in the treaty-

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22 Madison's Papers, III:1412-14.
23 Ibid.
24 Ibid.
25 Madison's Papers, III:1415.
28 Madison's Papers, III:1526.
29 Ibid.
making power, and when, late in the Convention, the Constitu-
tion, in practically its final form, was presented, Article II, Sec-
tion 2 provided that "He (the President) shall have power, by
and with the advice and consent of the Senate, to make treaties,
providing two-thirds of the Senators present concur. . . ."20

The uneven contest was not yet ended, however, for the
question of House participation in the treaty power was destined
to break out afresh in several of the state ratifying conventions.
One of the most interesting of those state contests occurred in
Pennsylvania, where the minority submitted a report in which
stress was laid upon the extent and scope of the treaty-making
power. The minority criticized the non-participation of the
House of Representatives, the popular and national branch of
the legislature, in treaty-making, and suggested that a treaty,
if contrary to a law of Congress, should not be valid until such
law had been repealed or had been made conformable to the
treaty. The following amendment to Article VI, Clause 221 was
proposed:22

Provided always that no treaty, which shall hereafter be made,
shall be deemed or construed to alter or affect any law of the United
States, or of any particular state, until such treaty shall have been laid
before and assented to by the House of Representatives in Congress.

In the Virginia convention, Patrick Henry, as was to have
been expected, attacked the power of making treaties as "ill-
guarded."23 George Mason, after reiterating Henry's conten-
tion that the power was not sufficiently guarded, argued that the
treaty process required more solemnity and caution. Treaties
should be made only in cases of "most urgent and unavoidable
necessity," and since certain treaties might be used to "dismem-
ber the empire," such agreements should require the consent of
three-fourths of both branches of the Congress.24 Although the

21 The "supreme law clause."
22 Jonathan Elliot, Debates on the Adoption of the Federal Con-
stitution, II:542-46; the amendment is at p. 546. See also Butler,
23 Elliot's Debates, I:500.
24 Elliot's Debates, III:508-09. In another connection, Mason
argued in his oft-quoted objections that "By declaring all treaties
supreme laws of the land, the Executive and the Senate have, in many
cases, an exclusive power of legislation, which might have been avoided,
by proper distinctions with respect to treaties, and requiring the assent
of the House of Representatives, where it could be done with safety."Elliot's Debates, I:495.
Constitution was ratified, the Virginia convention proposed the following amendment as a limitation upon the treaty-making power:25

That . . . no treaty ceding, contracting, restraining or suspending the territorial rights or claims of the United States or any of them or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers shall . . . be ratified without the concurrence of three-fourths of the whole number of the members of both houses respectively.

The following proposed amendment was offered in the convention in North Carolina:26

That no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed, or made conformable to such treaty; nor shall any treaty be valid which is contradictory to the Constitution of the United States.

Regardless of the number of similar amendments proposed, nothing concrete came from these overtures looking toward the inclusion of the House of Representatives in the treaty power.

Hamilton and Jay, in writing the Federalist, took occasion to uphold the treaty provisions of Article II, Section 2. As regards the negotiation of treaties, Jay suggested that there doubtless were many persons "who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly." Jay then went on to refute the contentions of those who held that, since treaties were to have the force of laws, "they should be made only by men invested with legislative authority." "It surely does not follow," contended Jay, "that because they have given the power of making laws to the Legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected!"27 Little did Jay realize that within seven years from the time of the expression of these sentiments he would be wildly criticized and burned in effigy for a part which he was destined to play in connection with the treaty-making power, and that the treaty, which was to bear his name and was to be in large part the product of his own mind and hand, would be the spark which would

25 Ibid., III:660; also Documentary History of the Constitution, II:382.
26 Elliot's Debates, IV:246.
27 The Federalist (Ford's Edition), No. 64, pp. 429, 431.
set off one of the greatest constitutional debates in the early history of our government.

Hamilton’s opinions on this particular phase of the treaty-making power are so well known and have been so often quoted that they are best expressed in his own words:28

“The remarks made in a former number . . . will apply with conclusive force against the admission of the House of Representatives to a share in the formation of treaties. The fluctuating, and, taking its future increase into account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to National character; decision, secrecy, and dispatch are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be the source of so great inconvenience and expense, as alone ought to condemn the project.”

In these earlier jousts on the question of the non-participation of the House of Representatives in the treaty-making power, it should be emphasized that the two questions which in later constitutional history were to form the core around which major congressional debates have centered, seem not to have been seriously debated if, in fact, they were more than casually mentioned. These two questions are: (1) When a request for treaty papers, ministerial instructions, or other diplomatic information issues from the House of Representatives, is the Chief Executive under any obligation to accede to said request? and (2) Is the House of Representatives constitutionally or morally bound to vote the appropriations provided for in treaties negotiated by the President and the Senate, or may that body be governed by its own discretion as to the necessity of approving such expenditures? These two major propositions seem largely to have been lost sight of in the controversy concerning the direct participation of the lower house in the treaty-making process.

The House debate in 1796 concerning the treaty with Great Britain, commonly known as the Jay Treaty, constituted the earliest important constitutional landmark as to the meaning

*The Federalist (Ford’s Edition), No. 75, pp. 502-03.
and application of Article II, Section 2—at a time when precedents were being formed and governmental principles defined and allocated. The treaty embodied in its provision certain agreements which called for the appropriation of sizeable sums of money before the contracts could be carried into effect, and it was with these provisions in mind that Washington submitted a copy of the compact to the House of Representatives for its information. This "remarkable contest" grew out of the request by the House to the Executive for certain papers used in connection with the negotiations, on the grounds that the treaty dealt with subjects which were, by the Constitution, placed in the control of the legislative branch of the government, and that if the House was expected to vote the appropriations necessary to carry the treaty into effect, it had a perfect right to ask for the papers for purposes of information.

During the progress of the debate, Representative Baldwin saw nothing unusual in asking for the papers inasmuch as the President had taken the initiative in sending a copy of the treaty to the House. He dwelt on the desirability of publicity in treaty negotiations and argued that it would be unfair for the House to take up the subject of the treaty "naked and unexplained." Mr. Gallatin interpreted the question before the House as being, "Did the House have any discretionary power in regard to the Treaty?" There could be no harm in asking for the information and some good might come from it, he contended. The question which James Madison saw thrown before the House by the resolution was, "Does the general power of making treaties supersede the powers of the House of Representatives, particularly specified in the Constitution, so as to take to the Executive all deliberative will, and leave the House only an executive and ministerial instrumental agency?" Representaive Gallatin made one of the best reasoned arguments delivered during the course of the debate on the House resolution. It was his opinion "that the House had a right to ask for the papers proposed to be called for, because their cooperation and sanction were necessary to carry the Treaty into

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30 Ibid., pp. 435-36.
31 Annals, V: 436-37.
32 Ibid., pp. 437-38.
full effect, to render it a binding instrument, and to make it, properly speaking, a law of the land; because they had a full discretion either to give or to refuse that cooperation; because they must be guided, in the exercise of that discretion, by the merits and expediency of the Treaty itself, and therefore had a right to ask for every information which could assist them in deciding that question." If a treaty deals with subjects which are, by the Constitution, placed in the hands of the legislative branch of the government, the sanction of that branch is necessary before the treaty properly becomes the law of the land. "In this case, and to this end, the Legislature have a right to demand the documents relative to the negotiation of the Treaty, because that Treaty operates on objects especially delegated to the Legislature." The power to make treaties, Gallatin contended, is limited by other parts of the Constitution, and, to be specific, the power of the President and Senate to provide for appropriations of money through the agency of the treaty-making process is limited by the congressional control of the purse.33

Mr. Madison presented a logical and studied contention against the encroachment of the treaty-making power on the prerogatives of the Legislature. The House should be careful, he asserted, to avoid intrusions on the powers of the other departments, but it should also be alert to guard its own powers against aggression. He held it to be important and decisive that "if the Treaty power alone could perform any one act for which the authority of Congress is required by the Constitution, it may perform every act for which the authority of that part of the Government is required." As regards the power of the purse, the Treaty power could not be considered as paramount to that of Congress. Ours is a Government of checks and balances, and it is not unreasonable "to lean towards a construction that would limit and control the Treaty-making power, rather than towards one that would make it omnipotent." The latter construction Madison held to be "utterly inadmissible." Legislation implies deliberation, and if the House were obliged to carry all treaties into effect without question and without deliberation, the legislative authority would become nothing more than an empty

33 Annals, V:464-74.
name. The Legislature would become the mere instrument of another power and would have no will of its own.\textsuperscript{34}

President Washington was firm, however, in his refusal to accede to the request of the House.\textsuperscript{35} He pointed out that the "nature of foreign negotiations required caution," with their success often depending upon secrecy. A full disclosure of all the elements entering into treaty negotiations would be "extremely impolitic," with the resulting possibility of "pernicious influence on future negotiation." "To admit . . . a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign power, would be to establish a dangerous precedent." The President argued that the only valid purpose for which the House might ask for an inspection of the papers was for the determination of impeachment—a purpose which the House resolution had not expressed.

The power of making treaties, asserted the Chief Executive, is vested exclusively in the President and the Senate, and every treaty "so made, and promulgated, thenceforward becomes the law of the land." Former Houses had acquiesced in this position and heretofore had "made all the requisite provisions" for carrying treaties into effect. This construction and practice coincided with the agreements reached, not only in the Federal Convention of 1787 but in the state ratifying conventions as well, and it was pointed out that the proposal to make the binding force of treaties contingent upon ratification by law had been rejected by the Philadelphia Convention.

Upon Washington's refusal to accede to the request of the lower branch, the House, after long debate, agreed by an extremely close vote to the passage of the requisite appropriations, but not until after it had expressed its views on the subject in clear and unmistakable language by the passage of the so-called Blount Resolutions, as follows:\textsuperscript{36}

\begin{quote}
Resolved, That, it being declared by the second section of the second article of the Constitution, "that the President shall have power, by and with the advice of the Senate, to make Treaties, provided two-thirds of the Senate present concur," the House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates
\end{quote}

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\textsuperscript{34} Annals, V:487-95.  \\
\textsuperscript{35} Ibid., pp. 760-62.  \\
\textsuperscript{36} Annals, V:771-72. Passed by vote of 57-35. Ibid., pp. 782-83.
\end{flushright}
regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the constitutional right and duty of the House of Representatives in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.

Resolved, That it is not necessary to the propriety of any application from this House, to the Executive, for information desired by them, and which may relate to any constitutional functions of the House, that the purpose for which such information may be wanted, or to which the same may be applied, should be stated in the application.

The importance of the Blount Resolutions, which have never been formally relinquished, cannot be overemphasized, for in them the House, although giving up all claim to a place in the actual negotiation and ratification of treaties, definitely reserved to itself the right to petition the President on treaty matters by means of resolution, and, what is infinitely more important, the right to exercise its discretion on the expediency of granting appropriations necessary to carry treaties into effect. Furthermore, it was frequently contended during the course of the Jay Treaty debate, and the position has subsequently been regularly upheld by the courts, that until Congress sees fit to appro-

27 Allen Johnson, Readings in American Constitutional History, 1776-1876, p. 197.
28 Herman W. Morris, writing in 37 American Law Review 363-80, in an article entitled, "The Power of Congress over Treaties," states, at p. 369, that the controversy over the Jay Treaty "ended in nothing practical. The House did not even define its views in any formal resolutions." In view of the passage of the Blount Resolutions, such an assertion must, it would seem, fall to the ground.
29 It would be valuable in this connection to follow through the decisions of the courts on this matter, (a study which comprises the latter part of this article, particularly the leading constitutional cases of Foster v. Neilson (1829), 2 Peters 253; Turner v. American Baptist Missionary Union (1852), 24 Fed. 344; Taylor v. Morton (1855), 23 Fed. 784; United States v. Tobacco Factory (1870), 28 Fed. 199, also 11 Wall. 616; Ropes et al. v. Clinch (1871), 20 Fed. 1171; La Abra Silver Mining Co. v. United States (1899), 175 U. S. 423; etc. The general doctrine laid down by the courts in these cases is that Congress has the power to refuse to provide appropriations for carrying a treaty into effect, at its discretion, and, although such a treaty, when ratified and promulgated, becomes the "supreme law of the land," yet the enforcement remains dormant until Congress shall see fit to provide the necessary funds. This holding, of course, does not apply to self-executing treaties, that is, those which require no appropriation before they can be carried into effect. The courts have also held that since laws and treaties, both being the "supreme law of the land," are placed on the same constitutional plane, the later one in point of time will be enforced in case of conflict, . . . be it law or treaty, . . . and hence Congress has the power by law to violate or to abrogate a treaty, although at the risk of condemnation by the other party or parties to the compact.
priate such moneys as are necessary to carry treaty provisions into effect, those provisions, although normally held to be the "supreme law of the land," remain ineffectual and inoperative until appropriations have been made to give them life and strength. "Thus ended," says Butler, "the first of the great parliamentary battles fought by the House of Representatives to gain control of the treaty-making power of the United States."41

The Jay Treaty contest relative to the proper relation of the House of Representatives to the treaty-making power was only the first of a series of similar contests which have recurred at intervals from 1796 to the present day.42 And in practically all of the succeeding contests, the positions set forth and the contentions presented show a striking similarity to those enunciated in the Jay controversy.

The question that frequently recurs is: "Has the House of Representatives the right to withhold its consent to a bill for putting a treaty into effect, and to thereby defeat it? Or, in another form: What is the nature of the obligation which rests on the House of Representatives to give validity to a treaty which has been negotiated by the Executive?"

40 At least so far as the United States, as one of the parties to the treaty, is internally or municipally concerned.

"Butler, op. cit., I:429. Butler claims that the result of the Jay Treaty controversy was a "distinct victory for the Executive," in that Washington refused to comply with the request of the House and managed to uphold his position, thereby denying to the House a definite niche in the treaty-making process. On the other hand, H. S. G. Tucker contends that Butler's contention cannot be upheld, and he goes into subsequent history for examples with which to prove his case. Tucker's thesis is that Presidents have learned a lesson from the Jay controversy, and he runs the gauntlet of the Presidents showing how they have, in turn, carefully handled the House in an attempt not to antagonize it so as to jeopardize the chances of obtaining treaty appropriations. Limitations on the Treaty-Making Power under the Constitution of the United States, Chapter VIII, "Treaty Power and the House of Representatives," pp. 202-38.

42 Some of the more important of these contests have arisen in connection with the Louisiana Purchase treaty of 1803; the commercial treaty with Great Britain, 1815; the French treaty of 1831; the Alaska Purchase treaty of 1867; the Mexican commercial treaty of 1883 in which the House upheld its right to refuse to vote appropriations for a treaty which, it was held, interfered with the exercise of its constitutional powers; the Hawaiian reciprocity treaty of 1884; the Colombian treaty of 1921, ... to say nothing of many others. But in all these cases, with the single exception noted, even though its right to a discretionary prerogative was uniformly asserted, the House has followed the precedent set in 1796 and the necessary appropriations have been voted.
been formally entered into with a foreign nation by the President, and properly ratified by the Senate?" With a single exception, the House has always proceeded on the theory, apparently, that since a treaty is a solemn international contract and since the United States would no doubt be charged with having violated its trust as expressed in a sacred international agreement if the means of execution were denied, it is expedient for it to forego its own discretion and prerogatives for the sake of international comity. Nevertheless, inasmuch as the House has not and doubtless will not relinquish its legal right to exercise its discretion in such matters, it would seem that the prudent Executive will ascertain the sense of the House, when appropriations will be called for by the treaty, before proceeding upon contemplated negotiations.

From the point of view of one interested in the final determination of the matter here under consideration, it is unfortunate that the Treaty of Versailles, including the League of Nations protocol, was not approved by the United States Senate. In view of the highly agitated state of public opinion at the time on the general subject of the League, and in view of the oft-expressed threat on the part of various representatives that the House must some day arise and assert its alleged constitutional prerogatives as regards treaties and treaty-making, it is interesting to contemplate what action, if any, the House would have taken in the event of the Senate's approval of the treaty. It is no doubt probable that the House would have concurred in the action of the Senate and that the appropriations necessary for carrying the treaty into effect—and, incidentally, of carrying the United States into the League of Nations—would have been forthcoming. On the other hand, to continue the contemplation, it is by no means beyond the reach of the imagination to suppose that the House, carrying out an anti-League mandate from the people at large (presupposing again that such a mandate existed), would have risen to the occasion and, in view of the momentous issues at stake, would have cast precedent and tra-

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*In the case of the commercial treaty with Mexico, 1883. See note 42 above; also Butler, op. cit., II:478-79; also House Reports, 49th Cong., 1st Sess., (Vol. IX), No. 2615 (1883).
dition to the winds and would have refused to vote the requisite appropriations, thereby leaving the President, the Senate, and the treaty high and dry and with little hope of being able to carry the treaty stipulations into effect.

To recapitulate, it must be said that, despite the bid frequently made by the House of Representatives for a place in the treaty-making sun, there seems to be no popular demand for a change in the treaty-making process, at least so far as extending participation to the lower house is concerned. Proposals have been made from time to time that, for example, "the requirement of the approval of treaties by a majority of both houses of Congress would, it would seem, better comport with the desideratum of democratic control of foreign affairs. This is especially true in view of the highly unequal constituencies from which senators spring. . . ."45 Although such a change may come eventually, the firmly entrenched doctrine remains, as summarized by Judge Cooley:46

"Check on the Treaty-Making Power.—The full treaty-making power is in the President and Senate; but the House of Representatives has a restraining power upon it in that it may in its discretion at any time refuse to give assent to legislation necessary to give a treaty effect. Many treaties need no such legislation; but when moneys are to be paid by the United States, they can be appropriated by Congress alone; and in some other cases laws are needful. An unconstitutional or manifestly unwise treaty the House of Representatives may possibly refuse to aid; and this, when legislation is needful, would be equivalent to a refusal of the government, through one of its branches, to carry the treaty into effect. This would be an extreme measure, but it is conceivable that a case might arise in which a resort to it would be justified."

**THE CONSTITUTIONAL DILEMMA**

No more than a cursory examination of the Constitution will disclose that, as regards the treaty-making power, there appears to be what Chalfant Robinson has aptly termed a "constitutional dilemma."47 A conflict of authority appears to exist in that "the field of legislation and the field of diplomacy overlap," and there exist "the apparently inconsistent and conflicting powers vested by the Constitution in different branches of the Federal

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government; that is, the general power of legislation on the one hand, and the treaty-making power on the other."

In other words, Congress, by the terms of Article I, Section 8, is given the power to regulate foreign commerce, to declare war, and "to lay and collect taxes, duties, imposts and excises," while under the Constitution the grant of power to the treaty-making agencies is in its terms unlimited, unless by implication and by the application of principles of general constitutional construction, although Article VI indicates that only treaties made "under the authority of the United States shall be the supreme law of the land." What is the outcome, therefore, when the President and the Senate—the constitutional treaty-making power—propose a treaty purporting to regulate foreign commerce or another to outlaw war, either in a field of action which, by Article I, Section 8, falls within the jurisdiction of Congress? Are these congressional grants of power to imply that the treaty-making power shall not extend to such subjects? Or, granted that a treaty may be made which, for example, imposes regulations upon foreign commerce, how far may the President and the Senate proceed without dispossessing Congress of its definite, constitutional control of that subject under Article I, Section 8? No expansion of the legal imagination is necessary to realize that the questions presented by this dilemma are of fundamental importance, nor is it to be wondered at that this apparent conflict has led, upon occasion, to much jealousy and friction between the House of Representatives on the one hand and the President or Senate, or both, on the other.

But there are other aspects of the problem. Many, if not most, treaties are not self-executing—that is, they cannot be carried into full force and effect on the part of the United States without certain legislative action, such as the appropriation of funds provided for by the terms of the agreement itself. When such appropriations are necessary to give life and strength to the treaty, may the House of Representatives substantially defeat it by refusing to grant the necessary funds; or is that body deprived of its discretion in the matter and hence morally, if not legally, bound by the Constitution and by the provisions of the


"Italics are the writer's."
solemn, international agreement to provide the required money? If such discretion be admitted, then is it not true that the House of Representatives becomes a moving, essential, vital part of the treaty-making power? The proposition is well put by Mr. Robinson, who declares that "if a treaty made by the President and the Senate, as the Constitution provides, requires the action of the House of Representatives to complete it, so as to make it valid, then the treaty-making power is not absolute with the President and the Senate, but is shared in by the House. On the other hand, if the treaty dealing with the revenues may constrain in advance the consent of the House, then bills of revenue may originate elsewhere than in the House of Representatives."

And, what is more, if a treaty requires an appropriation to give it effectiveness, and remains impotent and lifeless without such action, which, according to Article VI, is in reality the "supreme law of the land"—the treaty "made under the authority of the United States" or the congressional act of appropriation?

The House of Representatives has contended, quite naturally, that when a treaty deals with the regulation of foreign commerce, the adjustment of import duties, or, in short, with any subject the control of which is given by the Constitution to Congress, the House retains the right to refuse assent to the treaty by withholding appropriations or other legislation necessary to carry the treaty into full force and effect.

On the other hand, the President and the Senate—the constitutional treaty-making power—have asserted that when a treaty has been negotiated, approved by the Senate, ratified, and ratifications exchanged, it becomes the "supreme law of the land," and hence binding, not only upon the nation, individuals, and the courts, but upon Congress as well. It therefore fol-

51 The attitude of the House was expressed early in the so-called Blount Resolutions, 1796. Annals of Congress, V:771-72. (4th Congress, 1st session). See also note 36, ante.
52 This is the position taken by President Washington in what is perhaps the most important of all contests involving the propositions here under examination, . . . . the Jay Treaty controversy of 1796. See Annals of Congress, V:761-62. Charles H. Burr contends that "the Presidents of the United States have uniformly supported the view of Washington." The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States, p. 292. (The Crowned Essay for the Henry M. Phillips Prize of $2,000,
lows from this contention that Congress is under a moral, not to say constitutional, obligation to take the action necessary to enable the United States, as one of the contracting parties, to fulfill the requirements imposed by the treaty; and, further, that this obligation is so strong as to divest Congress of all discretion in the matter of providing the necessary legislation.

The House of Representatives has, upon occasion, either rightly or wrongly, menaced this nation's international obligations under a treaty by threatening not to provide the funds necessary for its execution. This somewhat distressing arrangement has caused embarrassment to the treaty-making power in several instances, but it is a situation for which we can hold the Constitution responsible, as no remedy is expressly provided therein to meet the difficulties presented by the overlapping jurisdictions of Congress on the one side and the treaty-making power on the other.

The limited scope of the present article does not permit of an examination of the many occasions upon which the propositions presented by the aforementioned "constitutional dilemma" have been argued in and by the House of Representatives. The Jay Treaty joust only lighted the way for a series of similar controversies which were to follow in the next century and a quarter.\footnote{The best known of these subsequent controversies occurred in connection with the Louisiana Purchase treaty with France, 1803; the commercial treaty with Great Britain, 1815; a similar treaty with Prussia and the Germanic Confederation, 1844; the Gadsden Purchase treaty with Mexico, 1853; the Canadian reciprocity treaty, 1854; the Alaska Purchase treaty with Russia, 1867; the Hawaiian reciprocity treaty of 1876; the commercial reciprocity convention with Mexico, 1883; the renewal of the Hawaiian treaty, 1884; and other more recent cases of greater or less importance.}

The House and the Treaty-Making Power, 1867, for example, in connection with the Prussian and Germanic Confederation treaty of 1844, Senator Rufus Choate presented a report from the Senate Committee on Foreign Relations in which the rejection of the treaty was urged on the ground that since the Constitution communicates these powers to no other agency, "the general rule of our system is, indisputably, that the control of trade and the function of taxing belong, without abridgment or participation, to Congress." The report further urged that the legislature was more representative of the people, was in a position to obtain better information, and would be likely to use its
ample, called for an appropriation of some $7,200,000, and although the majority of the House was apparently willing to grant the necessary funds, that body "wished to couple the approval of the treaty with a reservation of the right of the House to approve or disapprove in all cases in which the sanction of the House is necessary to execute a treaty," but following a rebuff from the Senate on this point, the House compromised its views, and the preamble of the act by which the necessary moneys were appropriated mildly supported the House position as follows:

"and whereas said stipulations cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary; . . . ."

The renewal of the Hawaiian reciprocity treaty of 1876 occurred in 1884, but the question of the advisability of the renewal was not submitted to the lower house, and the inevitable contest followed. But this particular controversy produced one of the classics in the field of constitutional treaty literature, for it was at this juncture, 1887, that John Randolph Tucker of the House Committee on the Judiciary submitted his well known report concerning the constitutional aspects of the House power "more intelligently" and "more discreetly" than the Executive department. Senate Journal, 28th Cong., 1st sess., (1843-1844), 445-48 (June 14, 1844).


A resolution to this effect passed the lower branch by the overwhelming majority of 113-42, July 14, 1867.

Wharton's Digest, II: Sec. 131a, pp. 21-22. Charles Pergler holds that the "moral obligation" upon Congress to provide for the execution of the terms of an international compact by furnishing the necessary funds is, "of course, beyond dispute." Quoting Duer's Outlines of Constitutional Jurisprudence of the United States, p. 138, Pergler continues that the payment of funds called for by a treaty "renders it morally obligatory on Congress to pass the requisite law," and refusals so to provide constitute a "breach of public faith and afford just cause for war." "Limitations of the Treaty-Making Power," 98 Central Law Journal 41-45, (Feb. 5, 1925), at p. 44.
In 1883 there was concluded with Mexico a commercial reciprocity convention, which, like the Hawaiian treaty of 1876, contained a provision that it should not take effect "until laws necessary to carry it into operation shall have been passed both by the Congress of the United States and the Government of the United Mexican States. . . ." This action Congress failed to take, and after two conventions had been concluded extending the time for the enactment of the necessary legislation, the treaty ceased to be operative on May 20, 1887. So far as the writer has been able to discover, this constitutes the first and only time in our history that the House successfully proclaimed and executed its oft-asserted prerogative to exercise discretion in giving effectiveness to a treaty already concluded, but requiring auxiliary legislation to give it strength and performance.

The limitations of this article preclude any extended discussion, except incidentally, of the holdings of the courts concerning the general scope, extent, and limitations of the treaty-making power, although such holdings necessarily have an important bearing on the contentions expressed by the House of

"Treaty with the Hawaiian Islands," House Reports, 49th Cong., 2nd sess., Vol. II, No. 4177 (1886-1887). This report is essential to the student who would make a thorough study of the constitutional questions relative to the House and the treaty-making power.

Ibid., p. 23 of the report.

24 Stat. at L., 975-89, at p. 988. The treaty was approved by the Senate, ratified by the President, ratifications exchanged, and proclaimed on June 2, 1884.

See the reports of the Committee on Ways and Means, House Reports, 49th Cong., 1st sess., Vol. IX, No. 2615 (1885-1886).

Butler, op. cit., II:473-79.

It is a question whether Chalfant Robinson has not generalized a bit too freely from this single case when he asserts that the lower branch "thus determined that treaties dealing with the revenues are altogether under control of the House of Representatives, and that there is no obligation recognized in like treaties (italics are the writer's) to follow the action of the Senate by favorable legislation." Op. cit., 12 Yale Review 202. In the light of precedents established both before and since 1883, the adequate support of such a broad inference might prove somewhat difficult.
Representatives that the delegated powers of Congress under Article I, Section 8, limit the jurisdiction of the treaty-making agencies.

The United States Supreme Court, speaking through Chief Justice Taney, held in *Holmes v. Jennison* that the treaty-making power under the Constitution "was designed to include all those subjects, which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments."

Perhaps the leading opinion as to the extent and scope of the treaty-making power is that given by Justice Field in *Geofroy v. Riggs* in 1890, in which the Court held:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself, and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country."

The fundamental question remains, however, whether the delegated powers of Congress, to employ the language of the Court, constitute "restraints" which are found in the Constitution "against the action of the government or of its departments, and those arising from the nature of the government itself . . ." and whether a treaty involving the powers under Article I, Section 8, operates "to authorize what the Constitution forbids. . . ."

Calhoun contended that the treaty-making power was "limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary, of which a striking example is to be found in that which declares that 'no money shall be drawn from the Treasury but in conse-

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14 Peters 540, 569.
133 U. S. 258, 265-67; see also H. S. G. Tucker, op. cit., Chap. I.
quence of appropriations to be made by law.'" He continues:94

"This not only imposes an important restriction on the power, but
gives to Congress as the law making power, and to the House of Repre-
sentatives as a portion of Congress, the right to withhold appropri-
tions; and, thereby, an important control over the treaty-making power,
whenever money is required to carry a treaty into effect; which is
usually the case, especially in reference to those of much importance."

It was asserted by Thomas Jefferson that the wording of the
Constitution must have meant to except, as being outside the
jurisdiction of the treaty-making power, "those subjects of legis-
lation in which it gave a participation to the House of Represent-
satives." Jefferson acknowledged, however, that this excep-
tion was "denied by some on the ground that it would leave very
little matter for the treaty power to work on."65

Difficulties presented by this "constitutional dilemma"
have also come before the state courts for adjudication. In a
California case,66 for example, the state supreme court, through
Chief Justice Murray, has given as its opinion that the treaty-
making power cannot be extended by the President and the
Senate "to matters which are the proper subject of congressional
legislation; 'for it would,' as Mr. Jefferson truly remarks, in his
letter to Mr. Monroe, in 1796, upon the subject of the British
treaty, 'be virtually transferring the powers of legislation from
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To assert the proposition that the President and Senate are above
the Constitution in this particular, and that they may do in this behalf,
what the President, and both Houses of Congress cannot do, would be
destructive of the government; for, under the cover of a resort to the
treaty-making power, every outrage and injustice which illiberality
conceive, or fanaticism execute, may be perpetrated. . . .

"The power . . . must be . . . limited to objects
which are the peculiar and proper subject matter of treaty stipulation.
"The exercise of this power under the Constitution, can scarcely
extend beyond that of declaring war, making peace, regulating commerce,
and adjusting national misunderstandings or differences;

With the exchange of ratifications, a treaty becomes binding
upon the contracting parties in the international sense, whether

94 Discourse on the Constitution and Government of the United
also Emlin McClain, A Selection of Cases on Constitutional Law (2nd
Ed.), p. 536.
95 Manual of Parliamentary Practice, Sec. 52.
96 Stiemens v. Reber, 6 Cal. 250 (1856).
97 Ibid., at pp. 252-53.
or not the treaty requires auxiliary legislation by Congress to give it full force and effect so far as the United States is municipally concerned. One exception to this assertion may be noted, when the treaty expressly or by necessary implication provides that its binding force and execution shall be conditioned by other auxiliary action—usually legislative, but occasionally executive.

Charles H. Burr takes the position that "a treaty agreeing to pay money is none the less a treaty, whether or no the money be paid. It constitutes an executory contract and raises an obligation on the part of the United States to perform its contract." If Congress should repudiate the obligation, "the power to make a valid treaty would be untouched by such repudiation; the United States would remain bound in international law. Congress, however, has never yet in its history refused to recognize the obligation resting upon it, and it is unlikely it ever will." Granted that, when completed, a treaty becomes binding upon the United States in the international sense, yet, contends James Parker Hall:

"It is apparently the predominant opinion that treaty stipulations requiring the appropriation of money, or the cession of territory, or affecting the exercise of the power of federal taxation, or perhaps requiring the exercise of any governmental power other than that of enforcing and protecting private rights, do not become effective without federal legislation. . . ."

As in the case of the Mexican reciprocity treaty of 1883, supra.

John Norton Pomeroy, in his Introduction to the Constitutional Law of the United States, (10th Ed., Revised and Enlarged, by Edmund Bennett), pp. 567-68, par. 676, declares that: "Some treaties are so worded that, by their very terms, they apply directly to the subject-matter. They do not stipulate for anything to be done in the future; their provisions are not promissory; but they declare that a certain thing, state, condition, or right does thereby exist. Other treaties are wholly or partly executory; they agree that a certain thing shall be done. In regard to the first class, they are of themselves law; binding as such upon all public officers, and upon all private persons. In regard to the second class, they are, as such, binding only upon the government, and require legislative or executive acts, as the case may be, to render them operative. As there is no possible manner of forcing Congress to pass a law carrying out the provisions of such a merely promissory convention, the only remedy which the other high contracting party would have, for the neglect or refusal of the legislature to perform its stipulated duty, would be to treat the neglect or refusal as a breach of the treaty, and a good cause of war. That it would be sufficient ground for war, according to the settled rules of international law, cannot for a moment be doubted."

Burr, op. cit., p. 292.

THE HOUSE, TREATIES, AND THE "SUPREME LAW OF THE LAND"

Article VI, Clause 2, of the Constitution provides that the Constitution, laws "made in pursuance thereof," and treaties made "under the authority of the United States; shall be the supreme law of the land. . . ." The question then arises, —when is a treaty made under the authority of the United States, and when, therefore, does it become the supreme law of the land? And in case of conflict between a law of Congress and a treaty, which takes precedence over the other?

During the course of the House controversy on the subject of the Jay Treaty, 1796, Edward Livingston, member from New York, offered the novel, although untenable, suggestion that the order of enumeration of the supreme law clause was indicative of the authority which should be given to the three instruments. That is to say, the Constitution should be considered as supreme over both laws and treaties, and in turn a law should be superior to a treaty, since treaties are last named in the enumeration. Livingston proceeded to argue from this premise that the legislature was superior to the treaty-making power, as represented by the President and the Senate.

It has also been asserted that a treaty, being a bilateral or multilateral international compact, should, in case of conflict, have preference over a law of Congress, which is a unilateral, municipal act; and that a treaty, once made, could be change or abrogated only by the same power that created it. Although the courts have repeatedly overruled the contention, Justice E., 112 U. S. 536, 562-63 (1884), post. On the other hand, Everett P. Wheeler maintains "that a treaty, when made by the President of the United States and ratified by the Senate, is binding upon every resident of the United States and every citizen of the Republic wherever he may be, and that the President and the Federal Courts are vested with power to enforce the provisions of the treaty, and that it is the duty of Congress to pass all laws which may be necessary to carry these provisions into effect." "The Treaty-Making Power of the Government of the United States In Its International Aspect," 17 Yale Law Journal 151-61, at p. 151, (Jan., 1908).

"As to the interpretation of the clause "under the authority of the United States," found in Article VI, Clause 2, Justice Curtis held that it meant not only the President and Senate in the power, but "with the sanction of that law which is necessary to carry the treaty into effect." Taylor v. Morton, 23 Fed. 784, case No. 13,799, (1855). Affirmed, on appeal, in 2 Black 481. Cited in House Reports, No. 4177, 49th Cong, 2nd sess., Vol. II, p. 19.

Catron, in his opinion in the Dred Scott case, maintained that a subsequent law of Congress—the Missouri Compromise Act of 1820—was invalid because it conflicted with provisions of the Louisiana Purchase treaty of 1803.  

Justice Curtis, sitting on circuit, pointed out that the Constitution does not settle the matter of conflict between a treaty and a statute. Article VI, Clause 2, makes treaties a part of the municipal law, and gives them no particular degree of precedence, nor does it state whether treaties shall be paramount to laws already enacted.  

The position has been advanced, upon occasion, that if a treaty cannot be put into full force and effect without the aid of auxiliary legislative action, then, according to the wording of the supreme law clause, the legislative act and not the treaty constitutes the "supreme law of the land." If such a position can be substantiated, then the fundamental question to be determined in all cases is whether or not the treaty is self-executing.  

On a related point, the court held, in *Turner v. American Baptist Missionary Union*, that a treaty is the supreme law of the land only when the treaty-making power can carry it into effect, 

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**Footnotes:**


2. Pomeroy, speaking of treaties, op. cit., p. 118, takes the somewhat hazardous position that "Their quality is so high that Congress can only destroy them by a single act of legislation, namely, by a declaration of war against the nations with whom they are made." But what of treaties whose operation is only suspended during periods of war, and, again, of those which are not brought into full force and effect until hostilities actually begin, as those regulating modes and operations of warfare? Pomeroy also speaks of the treaty-making power as "this authority to pass laws which shall be supreme even over the ordinary proceedings of Congress." Ibid.


4. See Chas. H. Burr, op. cit., p. 325, who indicates that such a contention cannot be successfully upheld. Burr gives a long quotation from Chas. C. Pinckney, 1816, to substantiate his position, pp. 326-27.

5. Compare Quincy Wright’s article, op. cit., in 12 American Journal of International Law, 64-96, at p. 82. For a recent case in which were discussed the considerations governing when a treaty is self executing, and when subsequent legislation is required to make it effective, see *General Electric Co. v. Robertson*, (D. C. Md., Jul. 13, 1927) 21 Fed. (2d) 214. Discussed in 26 Michigan Law Review, 316-21 (Jan., 1928).

and that when the negotiated treaty calls for the payment of money, it undertakes something that the treaty-making power cannot do, because to give such treaty effect, the action of Congress is necessary. In this important case the court said, in part:

"A treaty under the federal Constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government."

The court went on to say that,

"The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the Constitution to make it such. As well might it be contended, that an ordinary act of congress, without the signature of the president, was a law, as that a treaty which engages to pay a sum of money is in itself a law. And in such a case, the representatives of the people and the states, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required."

In the California case of Siemsen v. Bofer, Mr. Chief Justice Murray opined:

"The true rule of interpretation, in my opinion, is, that whenever the treaty embraces matters which are the subject of legislation by Congress, it will require an act of legislation to carry the treaty into effect; otherwise the House of Representatives is a useless appendage to the political machinery of our government, and powers which are expressly prohibited to Congress, or reserved to the States, may be exercised through the instrumentality or omnipotence of the treaty-making power."

The opinion of the California judge that "whenever the treaty embraces matters which are the subject of legislation by Congress, it will require an act of legislation to carry the treaty into effect" has been supported upon numerous occasions by the House of Representatives. The facts, however, do not always bear out this contention, because, for example, numerous trea-
ties regulating commerce have been put into effect without any act of Congress. Justice Field, in his dissent in *Chew Heong v. United States*, took exception to the reasoning of Chief Justice Murray, and argued that a self-executing treaty, even though it relates to a subject within the power of Congress, “can only be regarded by the courts as equivalent to a legislative act.” Congress reserves the right, however, to modify the provisions of the treaty or to “supersede them altogether” by a subsequent act of legislation.

A few years later, in the Chinese Exclusion Case of *Chae Chan Ping v. United States*, the Court apparently had completely swung around to Justice Field’s position, for it was held that:

“If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.”

Charles H. Burr opines that the Court has repeatedly held that a self-executing treaty has the force of a congressional act even when the treaty relates to a subject generally considered to be under the control of Congress, and hence requires no subsequent act of legislation to give it force and effect. Burr, therefore, takes occasion to criticize Chandler P. Anderson, who had declared that it is still open for the Supreme Court “to hold

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83 See opinion of Justice Field in *Baldwin v. Franks*, 120 U. S. 678, 703-04 (1887), which states that under the right or privilege conferred by treaty, “those who wish to engage in commerce enter our ports with their ships and cargoes; those who wish to reside here select their places of residence, no congressional legislation being required to provide that they shall enjoy the right and privileges stipulated. All that they can ask, and all that is needed, is such legislation as may be necessary to protect them in such enjoyment.” (Italics are the writer’s).

84 112 U. S. 536, 562-63 (1884).

85 Burr states that the whole court concurred with Justice Field on this point, op. cit., p. 319.

86 130 U. S. 581, 600 (1899); see also the holding in *Geofroy v. Riggs*, 133 U. S. 258 (1890).

87 Burr, op. cit., p. 323. Compare with the practice in Great Britain: “In Great Britain, for instance, a treaty is recognized as an engagement binding in honor upon the government, but the courts cannot enforce it nor protect any rights which are claimed under it until authorized to do so by an act of Parliament. If a treaty conflicts with an act of Parliament, the statute always prevails.” Quoted, with citations, by Lawrence B. Evans in his Leading Cases on American Constitutional Law (2nd Edition), p. 542, note.
that no treaty dealing with matters entrusted to Congress is self-executing." 88

"When either of the parties to the treaty engages to perform a particular act," writes Pomeroy, "the convention addresses itself to the political departments of the government. But it is only when the act stipulated to be done is legislative under the Constitution, that Congress must execute the contract; when the act is executive in its nature, the President must execute the contract." 89

"Congress has no constitutional power to settle the rights under a treaty or to affect titles already granted by the treaty itself" except where the cases are purely political, for the Supreme Court has held that "the construction of treaties is the peculiar province of the judiciary." 90

Perhaps the leading opinion on this point is that given by Chief Justice John Marshall in Foster v. Neilson. 91 The following doctrine was announced by the learned Chief Justice:

"A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Power of Congress to Violate or Abrogate Treaties; the Responsibility Attached to Such Action

During our history there have been numerous conflicts between treaties and acts of Congress, and questions involving such contradictions have often been adjudicated by the courts. In the light of these decisions, there can no longer be any doubt as to the power of Congress to violate or abrogate treaties already

90 Jones v. Meehan, 175 U. S. 1, 32.
91 2 Peters 253, 314 (1829). See also Senate Document, No. 154, 68th Cong., 1st sess., p. 547.
in force.\textsuperscript{92} And it hardly needs be said that the power to abrogate belongs to the political and not the judicial arm of the government. Neither is it for the courts to question the wisdom of Congress in violating the provisions of a treaty.\textsuperscript{93}

Justice Curtis, on circuit, said in \textit{Taylor v. Morton} that:\textsuperscript{94}

"Inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the president, while they continue unrepealed, and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than Congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects, which the Constitution has placed under that legislative power."

"The foreign sovereign," said the court,\textsuperscript{95} "between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done, is, exclusively, for the consideration of the United States." The court declared that since Congress was given the constitutional power to regulate foreign commerce, to lay duties, and to make all laws necessary and proper for carrying these powers into execution, "There is . . . nothing in the mere fact that a treaty is a law, which would prevent Congress from repealing it. Unless it is for some reason distinguishable from

\textsuperscript{92} The question has arisen in some quarters as to whether or not Congress abrogates a treaty. In referring to violations of treaties by acts of Congress, the courts almost uniformly use the term "abrogate". Hall says that "any treaty may be abrogated (Italics are the writer's) by an act of Congress," but "treaties are not abrogated merely by a violation of them by either party, unless the political authorities of the other party elect so to treat them." \textit{Op. cit.}, p. 968, note. But compare Pomeroy, \textit{op. cit.}, p. 566, par. 674, "Congress having no power over them, (treaties) cannot abrogate or modify them. In general, therefore, the President, with the consent of the Senate, may enter into any species of treaty known in the intercourse of nations, any species known to the international law." Wharton speaks of the adverse action of Congress in 1798 as "annulling" the French treaties. \textit{Digest}, II, Sec. 137a, p. 59.

\textsuperscript{93} Repeals by implication are not favored, however, and the court has, in general, held that the later action will not be regarded as repealing the earlier merely by implication. The two must be "absolutely incompatible" so that one cannot be enforced without antagonizing the other. Justice Peckham in \textit{Johnson v. Browne}, 205 U. S. 309, 321 (1907). It logically follows, and is now a settled rule of interpretation, that in case of incompatible conflict between a congressional law and a treaty—"each being equally the supreme law of the land—the one last in date must prevail in the courts." Justice Harlan in \textit{Hijo v. United States}, 194 U. S. 315, 324 (1904).

\textsuperscript{94} 23 Fed. 784, 786.

\textsuperscript{95} \textit{Tbd.}, p. 785.
other laws, the rule which it gives may be displaced by the legislative power, at its pleasure.” Justice Curtis explained that it could not be maintained that the President and Senate possess the exclusive power to modify or repeal the law found in a treaty. If this were correct, the United States would never be able to abrogate by means of treaty except with the consent of the other party to the agreement. The court held that the Constitution did not pretend “to place our country in this helpless condition.”

Considering the general effect of war upon treaties, and noting that Congress is given the power to declare war, the court reasoned that it was not required by the Constitution that the same persons who made the treaty should alone have the power to repeal it. As to the constitutional power of Congress to regulate commerce and to levy duties, the court held that perhaps to a certain extent these powers were supposed to be exercised in conformance with existing treaties, but certainly not under all circumstances. War, then, certainly was not the only mode of escape from an existing treaty. The power “to refuse to execute a treaty . . . is prerogative, of which no nation can be deprived, without deeply affecting its independence,” and Justice Curtis concluded that he had no doubt that the power to abrogate belongs to Congress.96

96 Ibid., pp. 784-86. The Court applied much the same reasoning in U. S. v. Tobacco Factory, 28 Fed. 195, Case No. 16, 528 (1870), where it was held that Congress may abrogate a treaty in so far as it constitutes a municipal law, provided its subject matter is within the legislative power of Congress. Affirmed in The Cherokee Tobacco, 11 Wall. 618 (1871), where the Court declared, at p. 621, that a treaty may supersede a prior act of Congress, (cited Foster v. Neilson), and that an act of Congress may supersede a prior treaty, (cited Taylor v. Morton); and “if a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.”

Approved also in Ropes v. Clinch, 20 Fed. 1171, Case No. 12,041, where the court declared that it could not inquire whether Congress, in passing the contradictory act, had or had not an intention to pass a law inconsistent with the provisions of the treaty.

Approved also in Head Money Cases, 112 U. S. 580 (1884); Whitney v. Robertson, 124 U. S. 190, 194 (1888); Chae Chan Ping v. U. S. (Chinese Exclusion Cases) 130 U. S. 581; Pong Yue Ting v. U. S. (Chinese Deportation Cases) 149 U. S. 698 (1893); La Abra Silver Mining Co. v. U. S., 175 U. S. 425 (1899); Rainey v. U. S., 232 U. S. 310 (1914); and others. The argument for the appellants in several of these cases was that the determining factor should be the intent of Congress, i. e., that by its action, Congress did not intend to annul the provisions of a prior treaty.
In the Head Money Cases, Mr. Justice Miller in what Evans considers an "admirable exposition of the position of treaties in American constitutional law," declared that there was nothing in the essential character of an existing treaty which gives it a "superior sanctity" over a subsequent law of Congress. Pointing out that treaties are made by the President and Senate, whereas these two agencies plus the House of Representatives were required to make a law, the Court held that if there be any difference in their respective sanctity, "it would seem to be in favor of an act in which all three of the bodies participate," and that a treaty must be considered, therefore, as "subject to such acts as Congress may pass for its enforcement, modification, or repeal." As regards the matter of responsibility, however, the Court declared that the infraction of the treaty "becomes the subject of international negotiations and rejections, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war." 

This same fundamental question received somewhat elaborate treatment at the hands of the Court in the Chinese Exclusion Cases, the decision in which constituted a "landmark in the development of constitutional law in this country." The cases involved the Chinese Exclusion act of 1888, the treaty with China of 1868, and the supplementary treaty of 1880, and although here an unmistakable case of violation was presented, the Court upheld the statute on the oft-asserted ground that, both being the supreme law of the land, treaties carried no paramount authority over acts of Congress. The subsequent

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97 112 U. S. 580, 597-99 (1884).
98 Lawrence B. Evans, op. cit., p. 542, note.
99 Justice Swayne, in The Cherokee Tobacco, 11 Wall. 616, 621, proclaimed that although the congressional act of abrogation is binding upon the courts, yet the consequences that arise from such violation, even though in the last analysis they lead to war, must be met by the political and not by the judicial department of the government.
100 Chae Chin Ping v. United States, 130 U. S. 581, 600.
103 The so-called Burlingame Treaty, 16 Stat. at L., 733-41.
105 After discussing the court's decision in the Chinese Exclusion Cases, Everett P. Wheeler concluded that "This, after all, is holding that it is within the power of a nation to violate its solemn obligations. Such power exists, and must be reckoned with. But the obligation of honor and duty remains." Op. cit., 17 Yale Law Journal, 161.
Deportation Act of 1892\textsuperscript{106} raised similar questions, but, as before, the congressional act was sustained.\textsuperscript{107}

The general rule of construction in such cases seems to be, therefore, that when the treaty and the statute relate to the same subject, "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."\textsuperscript{108}

So far as the writer is able to discover, on but one occasion has Congress definitely, and in so many words, abrogated a treaty, although the Chinese exclusion legislation constituted a plain and unclothed abrogation of portions of the treaty with China. Congress, by an act of July 7, 1798, after a recital of the grievances held by this nation against France, declared that "the United States are of right freed and exonerated from the stipulations" of all existing treaties with that country, and "that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."\textsuperscript{109} But, as Wharton points out, "this annulling act . . . whatever might be its municipal effect, by itself could not internationally release the United States from its obligations to France."\textsuperscript{110}

\textbf{THE HOUSE AND THE BINDING FORCE OF REVENUE TREATIES}

In accordance with the constitutional stipulations providing that all bills for the raising of revenue shall originate in the House of Representatives, and giving to Congress the power to lay and collect taxes and import duties and to regulate commerce with foreign nations, the House has frequently denied the right of the treaty-making power, without the consent of the national legislature, to make commercial or revenue conventions infringing upon these powers and prerogatives. The House has by resolution declared that the negotiation of such treaties without its consent and cooperation would constitute "an infrac
of the Constitution and an invasion of one of the highest prerogatives' of that body.\textsuperscript{111}

The Tucker report of 1887 maintained that "it is absurd to suppose that by the treaty power the President and the Senate might enact revenue laws and laws appropriating the money of the people, through the agency of treaties, from all participation in which the House was to be excluded, when, by the Constitution, to that House was exclusively confided the key to the pockets of the people and the key to the door of their treasury." To concede the power of the President and the Senate to interfere with revenue duties would cause a result "abhorrent to our ideas of popular and representative government," and such a construction of the Constitution would prove "a stigma upon the intelligent patriots who framed it."\textsuperscript{112}

Chief Justice Fuller, in his dissent in \textit{Downes v. Bidwell},\textsuperscript{113} declared that "it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two-thirds of a quorum of the Senate."

Regardless of the fact that the courts have held that the validity of a self-executing treaty is not affected because it concerns powers given to Congress under the Constitution, "not only has the House uniformly insisted upon, but the Senate has acquiesced in, legislation by Congress to give effect to such stipula-

\textsuperscript{111}Crandall, op. cit., p. 196. See also the House Resolution of Jan. 31, 1902, calling upon the Ways and Means Committee for an investigation of the powers of the treaty-making departments in this field. Cong. Rec. 35; Part II: 1178.

\textsuperscript{112}House Reports, No. 4177, 49th Cong., 2nd sess., Vol. II, pp. 13-14. But see also House Report No. 225, 46th Cong., 3rd sess., pp. 1-4 (Feb. 14, 1881) where the House Foreign Relations Committee submitted a report holding that there is no conflict between the revenue powers of the House and the treaty powers of the President and the Senate. "All bills for raising revenue" does not include treaties—a treaty is not a bill for raising revenue, and the requirement that "all bills for raising revenue shall originate in the House of Representatives" is not a limitation upon the treaty-making power, but is only a condition imposed upon the ordinary law-making power of the government." The law-making power has nothing to do with the treaty-making power, "and to require the consent of the House of Representatives to make a treaty valid would violate the Constitution by making the House of Representatives a branch of the treaty-making power."

\textsuperscript{113}182 U. S. 244, 312. Justices Harlan, Brewer and Peckham concurred in the dissent. See also the opinion of Justice White, with whom concurred Justices Shiras and McKenna, 182 U. S. 319.
lations." And frequently "in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation has expressly been made dependent upon such action by Congress."

Prof. Quincy Wright gives as his conclusion that "Although the competence of the treaty power has been clearly established by practice, the necessity of congressional action to carry out treaties affecting the revenue has usually been recognized, the negotiated instrument itself sometimes providing that it shall not become valid until the necessary legislation has been passed. With some dicta to the contrary, the courts have been inclined to recognize such treaties as valid and self-executing, though subject to any adverse action which Congress may subsequently take."

In view of the holding of the courts, discussed supra, the query may well be put as to the reason that there has not been a more persistent conflict between the treaty-making power and Congress on the subject of revenue treaties. Speaking of tariff duties, Burr explains that "there is a natural resolution of forces in favor of joint action by the treaty-making power and by Congress. Party government tends that way; a sense of responsibility toward the people and of delicacy toward the other contracting nation, would wish to avoid any possible friction. Today it has become a matter of almost legislative precedent,

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114 Crandall, op. cit., p. 195.
115 Ibid.
116 Op. cit., 12 American Journal of International Law, 68-69. Simon Greenleaf Croswell concludes that it is plain "(1) That treaties of commerce were well known at the time of adopting the Constitution; that it was well understood that such treaties might affect the tariff, and that with this understanding the framers of the Constitution deliberately gave the treaty-making power to the President and Senate free from any control of the House of Representatives. (2) That the clause which provides that Congress shall regulate commerce and trade was inserted to transfer this power from the States to the general Congress, and has no direct or indirect bearing against the power of the President and Senate to make such treaties of commerce as they may see fit. (3) That the provision that all bills for raising revenue shall originate in the House, does not apply to treaties. (4) That the provision which states that the treaties of the United States shall be the supreme law of the land, was inserted to prevent State laws from nullifying the treaties, and has no application to any conflict between a United States statute and a treaty. Which of those shall take precedence is a wholly different question. . . ." "The Treaty-Making Power under the Constitution," 20 American Law Review, 513-27, at p. 519 (1886).
that Congress shall fix duties when questions of reciprocity arise." 117

Professor Wright has succinctly stated what seems to the writer to be the correct conclusion on this point. Precedent seems to require that treaties which alter the revenue laws shall have "congressional cooperation for their execution" and "while, even in these matters, Congress is under a positive obligation to act so as to give effect to a ratified treaty, yet the treaty-making power is under an equal obligation to consider, in connection with its view of international policy, the views on domestic policy of Congress, before finally ratifying the instrument. . . . An opportunity for Congress to pass upon treaties of this character before ratification would seem generally expedient though not legally necessary." 118

TREATIES AND THE POWER OF CONGRESS TO DECLARE WAR

In view of the prevalence of discussion concerning the Kellogg treaty providing for the outlawry of war, it seems pertinent to examine the results of the adoption of this or similar treaties providing for abstention from war under certain designated contingencies, upon the power of Congress to declare war. The United States has, in the past, become a party to several treaties, such as the so-called "Bryan Arbitration" treaties of 1913-14, whereby the contracting parties agreed "not to declare war or begin hostilities" for at least one year, pending investigation and report by an international commission.119 The question logically arises, as it did many times during the congressional debate on the Versailles Treaty, whether or not the power of Congress to declare war can in any manner be limited, not to say prohibited, by a treaty concluded by the President and the Senate.

The best opinion appears to be that Congress cannot be finally deprived of its power to declare war by any means short of the adoption of a constitutional amendment to that effect. The consequence of the adoption of such agreements as the Bryan and Kellogg treaties is not to deprive Congress of its constitutional power to declare war, but rather to create an obligation to refrain from such action in certain contingencies. If

Congress chooses not to be bound by the obligation thus created, this nation may be subjected to such remedial action as the injured contracting party feels is commensurate with this country's breach of good faith.

Although war is declared by Congress, heretofore the normal method of legally bringing a war to a close has been by treaties of peace. Says John Randolph Tucker, "Some stress is laid upon the power of a treaty of peace to repeal a declaration of war. It is conceded that this may be, but the reverse is equally true. A peace by treaty today may be repealed by a declaration of war tomorrow. Congress cannot create the status of peace by repealing its declaration of war, because the former requires the concurrence of two wills, the latter but the action of one."121

There can be no doubt, as indicated by the authority just quoted, that a declaration of war has very real results upon treaties in effect between the belligerents at the moment of the declaration. According to international law, some treaties are terminated, the operation of others merely suspended, while others are brought into their full force and effect, by a declaration of war. The last statement by Tucker, however, carries significance in view of the passage by Congress in May, 1920, of the so-called Knox Joint Resolution, by whose terms the declaration of war of April 6, 1917, was repealed. This attempted "unilateral termination of war" was vetoed by the President. If such attempts by Congress prove successful in the future, the effects of such action upon the treaty-making power in relation to treaties of peace can only be contemplated.122

CERTAIN MISCELLANEOUS CONSIDERATIONS123

One of the influences exerted by the House upon the President and the Senate about which little has been written is that

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120 Judge St. George Tucker criticizes this constitutional arrangement in that it enables the President and Senate to "relinquish the prosecution of the war" and the House is given no power "to prevent, or retard the measure," in case that body thinks the prosecution of the war should continue. Quoted by H. S. G. Tucker, op. cit., p. 7.
122 See Fenwick, op. cit., p. 575.
123 If space allowed, at least three additional aspects of the question might be treated:
   (a) The power of Congress in relation to treaties acquiring territory. It would appear from the decisions in the Insular Cases that
informal and intangible, but no doubt very real, political pressure which a concurrent branch of the national legislature may bring to bear. Not only does the House as a body possess political means by which it may urge action upon the Executive and the Senate, but the influence of the interplay of individuals in and between the two legislative bodies, as well as with the President, must not be underestimated. Informal, personal persuasion by House members upon their colleagues in the Senate undoubtedly exists, although quite naturally such forces do not appear in the record! Influences of this sort, although practically aloof from the process of measurement, cannot but exist when two legislative bodies—politicians all—come together. Then, of course, there is the ever-present weapon which may, upon occasion, be employed by the House for the protection of its interests and desires—the threat to refuse to give favorable consideration to legislation proposed and supported by the President or the Senate, or both.

Another force which does not lend itself to accurate determination is the practice in the House of not infrequently debating the merits of a proposed, or even of a completed, treaty, as although it is well settled that territory may be acquired by treaty, yet only by law of Congress can such territory be incorporated into the United States. But compare Burr, op. cit., pp. 294-98. See especially the opinions, concurring and dissenting, in Delaína v. Bidwell, 182 U. S. 1; Downes v. Bidwell, 182 U. S. 244; also, Santiago v. Nogueras, 214 U. S. 260, 265.


(c) Extension of congressional jurisdiction through the exercise of the treaty-making power. Under the provisions of Article I, Sec. 8, Par. 18 of the Constitution, the courts have held that a treaty may make Congress competent to pass legislation otherwise incompetent to it. See opinion of Justice Harlan in Neely v. Henkel, 180 U. S. 109, 121 (1901). See Hall, op. cit., pp. 967-68, note, for a list of cases in point. Note especially the matter of migratory bird legislation, declared void in United States v. Shauver, 214 Fed. 154, and in U. S. v. McCulloagh, 221 Fed. 388; then upheld, under the terms of a subsequent treaty, in Missouri v. Holland, 252 U. S. 416 (1920), where this subject is discussed at some length by Justice Holmes.
a part of the regular order of business. Can the Senate which has under consideration a treaty be blind and impervious to a House debate on the merits of the said compact? From the very nature of the bicameral legislative system, it would seem that it can not. These House debates, sometimes short, sometimes prolonged at great length, are quite likely to occur whenever a protocol of any importance has been, or is about to be, negotiated or ratified. Only in the past two years, to make use of two recent examples, were remarks extended in the lower branch on the subject of the Lausanne Treaty. The record for 1927 also shows, for example, that Representative Burton of Ohio made a "comprehensive and very able appeal for the ratification of the treaty now pending in the other body to eliminate the use of poison gas in time of war between civilized nations. . . ."125

The House of Representatives has, of course, always retained and made use of its privilege to petition the President by means of resolution, and not infrequently have treaty debates in the lower branch been precipitated upon the question of the expediency of making certain requests of the Executive relative to treaties. The use of the petition by resolution does not seem to have diminished in recent years—a fact which may have some bearing on the effectiveness of this method of approach by the House.127

During the first session of the sixty-eighth Congress, for example, Representative Tucker proposed a House resolution "requesting the President of the United States to transmit to the House of Representatives a copy of the treaty between Great Britain and the United States having for its purpose the abolition of smuggling intoxicating liquors from Great Britain into America." During the course of the debate on the resolution, it was contended that the treaty with Great Britain amended the Volstead law which had been passed by Congress, and that

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124 Cong. Rec. 68; Part 2; 69 Cong., 2nd sess. (1927).
125 Ibid., p. 2088.
126 As, for example, the House contest on the Jay Treaty in 1796, which grew out of a resolution offered by Rep. Edward Livingston of New York, asking President Washington for certain papers connected with the negotiation of the compact. Annals, V:400-01:424.
127 In connection with the power of resolution, consider Pomeroy's assertion that "The President must, of course, take the initiative in making all treaties. Congress, as such, has nothing to say in the matter." Op. cit., pp. 665-66.
128 Cong. Rec. 65; Part 2; 1953. 68th Cong., 1st sess., (1924).
in view of this circumstance, there was need for House action upon treaties. The House, as a concurrent part of the legislative power, should not be forced to stand idly by and see its handiwork disrupted by the President and the Senate operating through the treaty-making power. However, the Secretary of State, in answer to the resolution, replied that it was not compatible with the public interest to furnish the House a copy of the British treaty. Unsuccessful in his first attempt, Representative Tucker shortly after offered another resolution questioning the constitutionality of the treaty, upon which no action appears to have been taken by the House. During the same session, Representative Connally of Texas proposed a resolution requesting the President to send to the House a copy of the treaty with Germany having for its purpose the abolition of the smuggling of intoxicating liquors from Germany into this country.

Two years later, Representative Berger proposed a joint resolution “directing the President of the United States to call an international conference for the purpose of revising the terms of the treaty of Versailles and to make public the secret treaties pertaining to the cause of the World War now in the archives of the allied governments and their associates.”

Several months ago, Representative Porter of Pennsylvania offered a resolution of more consequence—a concurrent resolution “requesting the President to enter into negotiations with the Republic of China for the purpose of placing treaties relating to Chinese tariff, autonomy, extraterritoriality, and other matters, if any, in controversy between the Republic of China and the United States of America upon an equal and reciprocal basis.” In the course of the debate on the resolution, Representative Lineberger, holding Congress to be a legislative and not an executive body, objected that the resolution savoured of Congress attempting to direct the President in foreign affairs.

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130 Ibid., p. 6724.
131 Ibid., p. 6931.
135 Ibid., pp. 4389-90.
Representative Beedy questioned whether it was good policy to give direction to the President considering the state of turmoil in China at the time, while Representative Chindblom did not feel that it was "a proper action for the House to request the President of the United States to negotiate a treaty," to which remark the record shows applause. Despite the objections, the resolution passed the House and was sent to the Senate.

### CONCLUSION

Henry St. George Tucker goes to much effort to prove that in the contest between the treaty-making power and the House of Representatives as to whether or not the House was "bound as a slave to the chariot wheel of this great power" and "the rights and duties of the House of Representatives as laid down in the Constitution were suspended or eliminated in a servile obedience to its dictates." The House has substantially come off the victor. Tucker asserts, after laboriously citing much historical detail, that, with one exception, every President from John Adams to McKinley has recognized the rights, influence, and power of the House of Representatives by sending to that body copies of treaties "which either carried appropriations or effected changes in the revenue laws of the land, for their consideration and action." Regarding the powers and influence of the House of Representatives, the author concludes that from the time of the Jay controversy in 1796 down to the present century, "In the assertion and reassertion of its constitutional prerogatives, it has finally forced from those who contested their position the admission that when an appropriation is carried in a treaty or the revenue laws are to be changed by its provisions, that neither can be attained without the consent of the House of Representatives, to whom the Constitution has confided a share in the determination of each. . . ."

Regardless of long-standing precedent and acquiescence, one has only to turn the pages of the record of the debates and

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139 Op. cit., Chap. VIII.
136 Ibid., Part 4: 4355.
135 Ibid.
134 Ibid., p. 4389.
133 Ibid., pp. 232, 236; see also pp. 6-9; 429.
of the resolutions offered in the House and Senate to discover that all is not calm as concerns the present time-honored system of treaty negotiation, approval, and enforcement. Representative Griffin, for example, has proposed in several recent sessions of the Congress a "joint resolution proposing an amendment to the Constitution taking away from the United States Senate the exclusive power to ratify treaties and vesting that power in both the Senate and House of Representatives,"143 while Representative Edmonds proposed, in 1919, a resolution asking for a report from the Judiciary Committee as to whether or not the President and the Senate can negotiate treaties involving subjects placed by the Constitution within the jurisdiction of Congress.144 Similar proposals have likewise come from time to time from private sources, as, for example, the statement of Professor Howard L. McBain that "the requirement of the approval of treaties by a majority of both houses of Congress would, it would seem, better comport with the desideratum of democratic control of foreign affairs. This is especially true in view of the highly unequal constituencies from which senators spring. . . ."145 Suggestions have also been made concerning the feasibility of taking the treaty-making power from the present departments and lodging it in a "Council of Foreign Relations."146

But in spite of all proposals, whatever their source, there must be a greater momentum than ever in the past if the constitutional "Executive-plus-the-Senate" method of treaty-making is to be modified to allow a share in the process to the House of Representatives.147 The House continues to possess an ever-potent gun behind the door, however, in its power to virtually nullify the operation and enforcement of a treaty by a refusal to vote the necessary funds for carrying its provisions into effect. And although the House is firmly bound by the

143 Ibid., Part 3: 3674.
146 For an old but good statement of the arguments against direct participation by the House in treaty-making, see Joseph Story, Commentaries on the Constitution of the United States (5th Ed., by Melville M. Bigelow), II, Secs. 1510-18.
force of precedent to appropriate any and all moneys asked for by a treaty, the time may come when treaty differences of sufficient magnitude between the House on the one hand and the President and the Senate on the other will cause the "Sword of Damocles" of the House to fall in the form of a refusal of appropriations, and the firmly entrenched doctrine of "passive approval" by the House will have been shattered.

As for treaties requiring auxiliary legislation in the form of appropriations, Crandall concludes that "if the concurrence of the House is necessary to the validity of the stipulation, its actions should precede the final ratification; since the execution of a treaty cannot with safety be commenced on our part, or be requested of the other contracting party, if its validity is still dependent upon the action of an independent legislative body." The mere fact that the question of House participation, or at any rate the question of freedom of appropriation discretion by that body, recurs so frequently, gives reason to conjecture that the practical fulfilment of the oft-enunciated doctrine that although "Congress is not a part of the treaty-making department, neither are its legislative functions any part of the treaty-making department," need occasion no stupendous astonishment if achieved in future years.

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